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No. 99-1567

In The

Supreme Court of the United States

PARAMOUNT PICTURES CORPORATION, a Delaware corporation, and HOST INTERNATIONAL, INC., a Delaware corporation,

Petitioners,

v.

GEORGE WENDT, an individual, and JOHN RATZENBERGER, an individual,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Err by Holding that the Copyright Act does Not Categorically Preempt State Right of Publicity Claims?

2. Did the Ninth Circuit Err by Remanding the Disputed Factual Issues of "Likeness" under California Civil Code section 3344 and "Likelihood of Confusion" under the Lanham Act for Trial by Jury?

3. Do the Ninth Circuit's Evidentiary Decisions Permitting Respondents to Present Factual Evidence to a Jury, including Survey Evidence and Expert Testimony, Require Review by the Highest Court in the Land?

4. Did the Ninth Circuit Commit Reviewable Error by Ruling on the Specific Factual and Procedural Issues Before It, Rather than Reaching Broad Constitutional Arguments Under the Dormant Copyright Clause and the First Amendment that Petitioners Never Raised in Any Court Below?

RESPONDENTS' RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Respondents George Wendt and John Ratzenberger inform this Court that they are both natural persons. Neither Respondent is owned by any parent corporation or by any publicly held or traded company.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. No "Compelling Reason" Justifies the U.S. Supreme Court's Review of an Interlocutory Appeal from a Fact-Intensive State Law Dispute

Although Petitioners relegate this point to the last footnote on the last page of their brief, the fact remains that this is an interlocutory appeal from a hotly contested fact-intensive state law dispute that has never yet been presented to a jury. This diversity case involves five state law claims, a fact-specific Lanham Act issue (over which states have concurrent jurisdiction), and no federal questions. Far from putting state rights on a "collision course" with federal copyright law, the Ninth Circuit did not expound on the scope of California's rights of publicity at all. The court merely held that the numerous factual disputes peppering Respondents' state law and Lanham Act claims should not have been resolved on summary judgment. The Ninth Circuit did *not* hold that Respondents did or would prevail on their Lanham Act and state law claims. Thus, at this point, there is no substantive legal decision for this Court to review.

In its present posture, this case is factually undeveloped and classically unripe for Supreme Court review.[1] Further proceedings may well affect or eliminate the preemption question Petitioners raise. Even if this Court were to decide that Respondents' state publicity claims were preempted, that would still leave four other

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[1] See *Anderson v. Green*, 513 U.S. 557 (1995) (dismissing *certiorari* because "the case in its current posture is unripe"); *Abbot Labs v. Gardner*, 387 U.S. 136, 148-49 (1967) (this Court's ripeness test considers: (1) the fitness of the issue and record for judicial review; and (2) hardship to parties if review is denied). "Hardship" means forfeiting a legal right or facing criminal liability, neither of which Petitioners will suffer here. Facing a civil jury after avoiding trial for seven years is not a legally cognizable hardship that warrants Supreme Court review.

claims for trial by jury. Because no decision by this Court at this time would resolve all the issues between the parties or dispose of this entire case, any preemption decision this Court might issue would be merely advisory.

Finally, the personal rights Respondents are trying to protect do not arise from or conflict with whatever rights Paramount may have in the fictional characters on *Cheers*. In fact, for the last ten years Paramount has vehemently denied that Host's robots fall under Paramount's copyright or Host's limited merchandising license. Host has changed its robots' names to sever any lingering connection to the characters on Paramount's show. Therefore, the purported conflict between copyright law and state rights of publicity that so perturbs Petitioners is entirely hypothetical.

A. This Case is Peppered with Unresolved Issues of Fact.

In contravention of U.S. Supreme Court Rule 14.1(g), Petitioners fail to apprise this Court of the numerous factual issues peppering this case. For instance, Petitioners neglect to mention that from the beginning of their license negotiations in 1989 (for Host to design airport bars modeled on the concept of the staged bar on *Cheers*), Host wanted to put moving robots of the characters "Norm" and "Cliff" in its bars, while Paramount opposed Host's effort and insisted that *Paramount's copyright in Cheers did not extend to robots* modeled on Messrs. Wendt's and Ratzenberger's personal likenesses. Before executing the limited merchandising license in 1990, Paramount "instructed [Host] that no actor's likeness could be used" without that actor's personal approval. ER 104 at p.73.[2]

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[2] "ER" refers to the Excerpts of Record filed with the Ninth Circuit on the second appeal in this case ("*Wendt II*," 1997).

Messrs. Wendt and Ratzenberger absolutely refused to authorize Host's robots. Dispensing with such details as authorization and compensation, Host gave *photographs* of Respondents to the robots' manufacturer and instructed him to create robots molded to Messrs. Wendt's and Ratzenberger's *"exact likeness."* ER 104 at 20-21, 80. For the next three years, Paramount insisted that Hosts robots were not covered by Paramount's copyright or Host's limited license:

- Before Host manufactured the robots, Paramount's in-house counsel warned Host that "as you know, our [licensing] Agreement does not permit the use of the actors' names or likenesses without their individual consent." ER 104 at 35 (7/24/90).
- One month later, Paramount assured Mr. Ratzenberger's agent that it had "advised Host that it must approach Messrs. Ratzenberger and Wendt individually and seek their consent for the construction of these devices and their use within the bar locations." ER 104 at 37 (8/24/90).
- Mr. Ratzenberger was so opposed to Host manufacturing a robot modeled on him, that he demanded that Paramount amend his contract to expressly provide that no such robots could be made without his consent. In response, Paramount assured Mr. Ratzenberger that since Host's "proposed use was not within a grant of Paramount's merchandising rights, there is no need to change [our] Agreement to prohibit such a use, for which we acknowledge [your] permission would have been necessary." ER 104 at 40 (8/27/90).
- Paramount then *again* warned Host that "whether you create life-like reproductions or caricature reproductions of the characters, you would be required to obtain both George

Wendt's and John Ratzenberger's consent." ER 104 at 41 (9/27/90).

* On October 4, 1990, Paramount's legal department viewed a videotape of Host's robots, and immediately informed Host that "the use of these figures, regardless of the caricature nature and the synthesized voices is *not permitted* without the prior written consent of John Ratzenberger and George Wendt. *On a purely legal basis, we believe that the case law in the Ninth Circuit . . . clearly dictates* the instructions that we have given you." ER 104 at 45 (10/5/90).

* In light of Paramount's formal legal opinion, Host admitted that it needed to get Respondents' personal consents to the robots, and sought "Paramount's influence to persuade them to participate, as we see this as a major drawing card of the *Cheers* concept." ER 104 at 46 (10/17/90). Paramount failed to secure Respondents' approval.

* Host then wrote to the actors' agents, admitting that Messrs. Wendt and Ratzenberger each "has an interest in any commercial use of his likeness, including his portrayal" in the robots, and offering the actors an annual license fee. ER 104 at 52-55 (10/30/90). Thus, Host admitted that the robots sufficiently captured the Respondents' personal "likeness" to require each Respondent's consent.

* Even after Host installed the robots, Paramount continued to insist that Host remove the robots from its bars or change them dramatically. ER 104 at 74. However, for Host, it was Messrs. Wendt's and Ratzenberger's personal likenesses – not Paramount's characters – that had commercial value. Therefore, Host agreed to sever the connection to

Cheers and changed the robots' names (calling Cliff "Hank" and Norm "Bob"), but refused to alter the robots' physical appearances. In other words, Host distinguished its "Bob" robot from the character "Norm," but not from Respondent George Wendt. Host told Paramount that Host "would take whatever risk would be associated with that decision." ER 104 at 76.

* As late as February 26, 1992, Paramount advised Host that in order to put to rest "any legal issues," Host should convert its robots to a neighborhood couple. Host refused. Petition ("Pet.") at 13a. It kept the robots modeled on Respondents' photographs.

* At the end of 1992, then-president of Paramount Television told Messrs. Wendt and Ratzenberger that Host was infringing on their personal rights by continuing to commercially exploit the robots without the actors' consent, and that Respondents should consider suing Host. ER 107; ER 104. Respondents filed this suit shortly thereafter.

As these few facts show – and Respondents have much more factual evidence to present to the jury at the appropriate time – Host knew since 1989 that its robots did *not* fall within Paramount's copyright in the *Cheers* show, and were *not* covered by Host's limited license. Host also knew that Messrs. Wendt and Ratzenberger were categorically opposed to Host using robots based on their personal "likenesses" to sell beer. In fact, Mr. Ratzenberger testified that Host's unauthorized use of his likeness is interfering with his own ability to work on paid commercials. Pet. at 13a-14a. In defiance of the actors' protests and Paramount's legal warnings, Host ordered robots "to be the exact likeness" of George Wendt and John Ratzenberger. As the Ninth Circuit held twice, whether and to what extent Host succeeded in capturing

Respondents' "likenesses" are factual questions for the jury.[3]

Rule 10 of this Court provides that "a petition for *certiorari* will be granted only for compelling reasons." Factual disputes are never "compelling" reasons to grant *certiorari*. "As to such issues, the courts of appeals are generally the courts of last resort."[4] Because no fact-finder has yet resolved the numerous factual issues riddling this dispute, this case is unfit for Supreme Court review.

B. This Case Involves Predominantly State Law Claims.

Besides statutory and common law publicity claims under California law, this case involves state law claims for invasion of privacy, unfair business practices, and unjust enrichment. There are no federal issues in this diversity case, and state courts have concurrent

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[3] By twice remanding this case "for trial," the Ninth Circuit was fulfilling its supervisory responsibility to ensure that district courts do not usurp factual issues away from the jury. The Supreme Court should not interfere with this important circuit court function. Since federal judges are appointed for life and are rarely impeached, appellate decisions are the only effective means of correcting trial judges who exceed their authority. Like this Court's supervisory function under S. Ct. R. 10(a), the Ninth Circuit has supervisory responsibilities over the largest circuit in the nation. When a district judge under its supervision twice ignores its express mandate and usurps the jury's function, it is incumbent upon the Ninth Circuit to correct the abuse.

[4] 23 *Moore's Federal Practice* (Matthew Bender 3d ed. 1997) § 510.41[4][a] [hereinafter, "Moore"]; *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951).

jurisdiction over the fact-intensive Lanham Act dispute.[5] As this Court explained, "We generally accord great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 224 n.10 (1985) ("[i]n dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are . . . unreasonable").[6] There is no compelling need for this Court to interpret the abstract scope of five state law claims before the Ninth Circuit has even issued a substantive legal decision.

C. This Court's Preemption Decision Would be Merely Advisory, because Four Other State Law and Lanham Act Claims would Still Proceed to Jury Trial.

Even if this Court were to hold that federal copyright law preempts Respondents' publicity claims, this ruling would not dispose of the case. Four other claims would remain: state law claims for unfair business practices, invasion of privacy, unjust enrichment, and false endorsement under the Lanham Act. Respondents have not yet had the opportunity to present any factual evidence to

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[5] *Duggan's Funeral Service, Inc. v. Duggan's Serra Mortuary, Inc.*, 95 Cal.Rptr. 253, 257 (Cal. App. 2000) (states have concurrent jurisdiction over Lanham Act claims).

[6] *See also Granberry v. Greer*, 481 U.S. 129, 136 n.9 (1987) (deferring to federal circuit's interpretation of state law because that court is more familiar with the practice of states within its circuit). Even if such cases raise federal questions, this Court usually defers to the circuit court's determinations of state law. 22 Moore's § 405.03[2][a]. As *Swift v. Tyson* teaches, this Court cannot compel states to follow its decisions in the area of state common law. 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842).

support their Lanham Act claim, because the trial judge excluded their survey evidence demonstrating actual consumer confusion (Pet. at 12a, 14a) and refused to apply the standard eight-factor "likelihood of confusion" test (Pet. at 10a). The Ninth Circuit has twice held that "because the Lanham Act's 'likelihood of confusion' standard is predominantly factual in nature," Respondents must be permitted to present their factual evidence, survey evidence, and expert testimony to the jury. Pet. at 11a, 14a. Surely this Court will not undertake to resolve the fact-intensive Lanham Act issues on this appeal.

Further, the Lanham Act claim is clearly not preempted, *see Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106-07 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993); *Hoffman v. Capital Cities/ABC, Inc.*, 33 F.Supp.2d 867, 874 (C.D. Cal. 1999).[7] Finally, even if both the Lanham Act and publicity claims were preempted, that would still leave three other state law claims, which Petitioners do not even mention. In short, no conceivable decision by this Court at this time would resolve the dispute between the parties or dispose of this entire case. Any preemption decision this Court would reach would be merely advisory. This alone is a compelling reason to deny *certiorari* at this time.[8]

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[7] *See also Nash v. CBS, Inc.*, 704 F.Supp. 823 (N.D. Ill. 1989), *aff'd*, 899 F.2d 1537 (7th Cir. 1990) (Copyright Act does not preempt Lanham Act claims). The one case Petitioners cite to the contrary is clearly inapposite, because it involved formerly copyrighted material that had passed into the public domain. *Comedy III Productions, Inc. v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000). Until Petitioners prove that Respondents' identities and personal likenesses have entered the "public domain," *Comedy III* is unavailing.

[8] Denying *certiorari* at this premature stage will not impede the Court's ability to address any issues in this case later on a more factually developed record. *See Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., denying *certiorari* because "[w]e generally await final judgment in the lower courts before exercising our *certiorari* jurisdiction");

II. There Is No Substantive Legal Decision for the Supreme Court to Review

A. The Ninth Circuit Did Not Decide that Respondents Did or Would Prevail on their State Publicity Claims.

Contrary to Petitioners' shrill claims, far from construing the scope of California's rights of publicity "so broadly as to conflict directly with federal copyright law," the Ninth Circuit did not embark on any abstract interpretation of state publicity rights at all. The Ninth Circuit merely held that, because Respondents' state law and Lanham Act claims raised many disputed issues of fact, the district court should not have resolved that beehive of factual disputes on summary judgment. The Ninth Circuit did not even attempt to construe the substantive scope of either the statutory (Cal. Civ. Code § 3344) or the state common law right of publicity. Instead, the Ninth Circuit expressly left these issues for the jury:

> The degree to which these robots resemble, caricature, or bear an impressionistic resemblance to appellants is . . . clearly material to a claim of violation of Cal. Civ. Code § 3344. . . . ***Without making any judgment about the ultimate similarity of the figures to the appellants, we conclude . . . that material facts exist*** that might cause a reasonable jury to find them sufficiently "like" the appellants to violate Cal. Civ. Code § 3344. Pet. at 5a-6a (emphasis supplied).

Similarly, all the Ninth Circuit held about the common law right of publicity was:

United States v. Virginia, 518 U.S. 515 (1996) (reviewing final judgment in same case). Further, "denial of *certiorari* imparts no implication or inference concerning the Court's view of the merits." *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366 n.1 (1973).

> Appellants have raised genuine issues of material fact concerning the degree to which the figures look like them. . . . The *ultimate issue for the jury* to decide is whether the defendants are commercially exploiting the likeness of the figures to Wendt and Ratzenberger intending to engender profits to their enterprises. Pet. at 9a.

As these rulings show, it is not the Ninth Circuit's interpretation of state publicity rights that is overblown, but Petitioners' exaggerated rendition of its modest holding.

B. Petitioners Never Established that Host's Robots are Protectable Derivative Works.

Paramount has consistently denied that Host's robots fall under Paramount's copyright in *Cheers*, and Host has yet to establish that its robots are copyrightable derivative works at all. Despite Petitioners' attempts to sweep these unresolved legal issues under the carpet, no court has yet determined that (1) the characters Norm and Cliff are copyrightable; (2) Paramount owns the exclusive rights to those characters; or that (3) Host's robots are protectable derivative works. None of these issues is beyond dispute. For instance, Dashiell Hammett's character "Sam Spade" was held too general a "type" to be copyrighted. *Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc.*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955). If the original hard-boiled detective is uncopyrightable, it is by no means clear that an overweight accountant can be.[9]

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[9] Although the Court need not address this issue now, Respondents never conceded that Paramount owns the exclusive rights to the characters Norm and Cliff. Under California's "merger" doctrine, an actor can acquire a proprietary interest in a character he has played for years. *See Lugosi v. Universal Pictures*, 25 Cal.3d 813, 825 (1979); *Supreme Records v. Decca Records*, 90 F.Supp. 904 (S.D. Cal. 1950); *see also McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994) (accord).

Also, whatever rights Paramount may have in the *Cheers* characters, it certainly has no rights to Mr. Wendt's or Mr. Ratzenberger's personal likenesses. Paramount cannot grant Host a license for what Paramount itself does not own. That is why for the last ten years Paramount has strenuously denied that Host's robots fall under the *Cheers* copyright or Host's limited merchandising license. To avoid legal complications with Paramount, Host abandoned the *Cheers* characters Norm and Cliff and renamed its robots "Hank" and "Bob." Host thereby undermined its own derivative works argument, and brought itself into direct conflict with Messrs. Wendt's and Ratzenberger's unequivocal rights to their own likenesses.

Even if Host's robots were derivative works, that is no guarantee of immunity. The copyright holder's right to create derivative works may be exclusive, but it is certainly not absolute.[10] Nor is the copyright protection in the resulting derivative work automatic or absolute. "Copyright is not a federally guaranteed 'right' to [unsettled] use [of] the copyrighted material." To the contrary, "ownership of copyright is not even immunity from copyright infringement, let alone infringement of other rights." J.T. McCarthy, *Rights of Privacy and Publicity* § 11.14[c] (1987) [hereinafter, "McCarthy"]. In short, even if Host's robots were copyrightable derivative works – which no court has yet held – that would not destroy Respondents' state publicity claims.

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[10] *See* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §§ 3.04, 8.09[A] (2000) [hereinafter "Nimmer"].

III. Because Federal and State Courts Uniformly Hold that Federal Copyright Law Does Not Preempt State Rights of Publicity, There is No Real Conflict that Warrants Supreme Court Review

The only way the Ninth Circuit's modest holding (requiring the numerous factual disputes to go to a jury) could be wrong is if state publicity claims were categorically preempted as a matter of law. No decision has ever held that federal copyright law automatically preempts state rights of privacy, personality, or publicity. Thus, there is no conflict with federal or California state law that requires the intervention of the highest court in the land.

A. The Ninth Circuit Correctly Applied the Standard Copyright Preemption Test under 17 U.S.C. § 301(a).

The Ninth Circuit in this case applied the standard preemption test under 17 U.S.C. § 301(a), pursuant to which only those rights are preempted that are "equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106." This involves a two-part inquiry: (1) is the item plaintiffs are trying to protect "within the general scope of copyright?" (that is, is it an original "work of authorship"); and (2) is the state law right "equivalent" to copyright, that is, is the right infringed by the mere act of reproduction, performance, distribution or display?[11] The Ninth Circuit correctly held that Respondents' publicity claims here survive both prongs of this standard preemption analysis.

First, the item Messrs. Wendt and Ratzenberger are trying to protect in this case is not a particular picture or representation, but their own personas and identities as

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[11] 1 Nimmer, § 1.01[B][1]; *Hoffman v. Capital Cities/ABC*, 33 F.Supp.2d 867, 871 (C.D. Cal. 1999); *KNB Enterprises v. Matthews*, 78 Cal.App.4th 362, 369 (Cal. App. 2000).

human beings. As every case that considered the issue has held, a human identity is not copyrightable subject matter, and an individual's personality is not a "work fixed in a tangible means of expression." *KNB Enterprises v. Matthews*, 78 Cal.App.4th 362, 365 (Cal.App. 2000); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462-63 (9th Cir. 1988); *Hoffman v. Capital Cities/ABC, Inc.*, 33 F.Supp.2d 867, 871 (C.D. Cal. 1999); *Brown v. Ames*, 201 F.3d 654, 656 (5th Cir. 2000) [all discussed *infra*]. Since Messrs. Wendt's and Ratzenberger's identities and "likenesses" are not copyrightable subject matter, their state law claims are not preempted under 17 U.S.C. § 301.

Second, the right Respondents are seeking to protect – their right to control the commercial exploitation of their own identities – is not "equivalent" to any of the exclusive rights under the Copyright Act. As Professor Nimmer explains, "a right that is 'equivalent to copyright' is one that is infringed by the ***mere act*** of reproduction, performance, distribution, or display." 1 Nimmer, § 1.01[B][1] at 12. In other words:

> [I]f under state law the act of reproduction, performance, distribution, or display . . . will *in itself* infringe the state-created right, then such right is pre-empted. But if qualitatively other elements are required, instead of, or in addition to, the acts of reproduction, performance, distribution, or display, in order to constitute a state-created cause of action, then the right does not lie "within the general scope of copyright," and there is no preemption. *Id.* at 13 (emphasis in original).

Professor Nimmer specifically explains that state publicity claims like those Respondents assert here are *not* preempted because the "work" protected under state laws of privacy and publicity does not fall within the subject matter of copyright:

> The "work" that is the subject of the right of publicity is the persona, *i.e.*, the name and likeness of a celebrity or other individual (citing directly to Cal. Civil Code § 3344). A persona can hardly be said to constitute a "writing" of an "author" within the meaning of the Copyright Clause of the Constitution. *A fortiori*, it is not a "work of authorship" under the Act. Such name and likeness do not become a work of authorship simply because they are embodied in a copyrightable work. . . .
>
> **Because the content of the protected right does not fall within the subject matter of copyright, there is no categorical preemption of the general right of publicity**. 1 Nimmer § 1.01[B][1][c] at 23-24 (emphasis supplied).

Countless cases have followed Professor Nimmer's formulation of the "copyright equivalency" test. The Ninth Circuit's application of this standard preemption test here is utterly unexceptional, and does not require Supreme Court review.[12]

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[12] In contrast, the unprecedented test that Petitioners concoct is circular and unworkable. Petitioners urge this Court to find preemption whenever "the work alleged to have violated the right of publicity . . . [falls] within the scope of copyright." Pet. at 10. Petitioner's "test" has several fatal defects. *First*, this is not the test the federal legislature prescribed in 17 U.S.C. § 301(a). The statutory test requires asking whether the item plaintiffs are trying to protect falls within the subject matter of copyright, not whether defendant's offending work is copyrighted. *Second*, just because a work is copyrighted does not automatically guarantee it immunity from legal challenge. "Ownership of copyright is not even immunity from copyright infringement, let alone infringement of other rights." McCarthy § 11.14[c]. *Third*, if the offending work is not copyrightable, the issue of preemption would not arise at all. If the mere fact that defendant's work was copyrighted put an end to the preemption analysis, Petitioners' "test" would always and

B. The Ninth Circuit's Decision is Based on a Long, Firmly Established Line of Directly Controlling Precedent.

Petitioners neglect to mention that California's most recent decision on the preemption issue just held that "because a ***human likeness is not copyrightable***, even if captured in a copyrighted [medium – in that case, a photograph, plaintiffs'] section 3344 claims against the unauthorized publisher of their photographs are **not** the equivalent of a copyright infringement claim and are **not preempted** by federal copyright law." *KNB Enterprises v. Matthews*, 78 Cal.App.4th 362, 365 (Cal. App. 2000). It is startling that rather than apprise this Court of the most recent state authority on the specific preemption issue on which they seek review, Petitioners relegate *KNB* to a footnote quoting a prior decision which *KNB* expressly limited "to the unique facts of that case." *KNB* at 374 (limiting *Fleet*); *cf.* Pet. at 13 n.5.

As discussed below, *KNB* demolishes Petitioners' contention that the Ninth Circuit misconstrued California state law. However, even without the benefit of this most recent state authority that "a human likeness is not copyrightable," the Ninth Circuit analyzed the preemption issue in strict accordance with every prior decision on this subject. In every prior case, the Ninth Circuit held that federal copyright law does *not* preempt state rights of publicity, and this Court has declined to review each of those decisions.

In *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *cert. denied*, 503 U.S. 951 (1992), the Ninth Circuit allowed Bette Midler to maintain a California common law right of publicity claim against Ford for copying Ms. Midler's voice in a car commercial. Ford did not use Ms.

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inevitably lead to the result of federal preemption. This is no "test" at all, but a rhetorical word game that collapses into its own assumed conclusion.

Midler's name, picture, or actual voice, and Ms. Midler did not own the copyright to the song used in Ford's commercial. *Id.* at 462. Nonetheless, the Ninth Circuit held that Midler's state law claim was *not* preempted because a "voice is not copyrightable. The sounds are not 'fixed.' What is put forward as protectable here is more personal than any work of authorship. . . . To impersonate her voice is to pirate her identity." *Id.* at 462-63. Just as in *Midler*, Petitioners here intentionally pirated Respondents' identities. Because "defendants deliberately imitated [plaintiffs] in order to sell a product, [defendants] have appropriated what is not theirs and have committed a tort in California." *Id.* at 463.[13]

In *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993), the Ninth Circuit reaffirmed *Midler* and expressly held that singer Tom Waits' common law publicity claim was "*not* preempted by federal copyright law." *Id.* at 1100. The subject matter of Mr. Waits' claim (unauthorized imitation of his voice to sell Doritos) was "for invasion of a personal property right: his right of publicity to control the use of his identity." This personal property right "does not come within the subject matter of copyright," and contains elements "different in kind from those in a copyright infringement

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[13] Similarly, in *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), defendants made a television commercial for Winston cigarettes using a modified photograph of a famous professional race car driver's signature car. Although the car's appearance was altered and the driver's features were not visible in the commercial, some viewers inferred that the car was Mr. Motschenbacher's, and concluded that he must therefore be endorsing defendant's cigarettes. Mr. Motschenbacher did not own the copyright to the photograph R.J. Reynolds used in its commercial any more than Ms. Midler owned the copyright to the song Ford used in its commercial. But in both cases, the Ninth Circuit held that defendants invaded the plaintiffs' "proprietary interest" in their own identities. *Id.* at 825.

case." *Id.* Therefore, the Ninth Circuit held that Mr. Waits' state law claims were not preempted,[14] and this Court denied review.

This Court has also declined review in *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993), and that is really the crux of Petitioners' complaint now. Petitioners cannot use this case to re-petition for review in *White*. Further, in order to create the impression of impending cataclysm, Petitioners exaggerate the Ninth Circuit's holdings in both *Wendt II* and *White*. Reviewing the Ninth Circuit's actual rulings, rather than Petitioner's overblown distortions, shows that all the Ninth Circuit did in both cases is refuse to let a trial judge usurp the jury's function by resolving disputed issues of fact on summary judgment.

In *White*, the Ninth Circuit *rejected* Vanna White's California Civil Code section 3344 claim against Samsung for making a commercial using a robot caricaturing Ms. White's role on *Wheel of Fortune*. That decision did not address the preemption issue at all. All the Ninth Circuit held in *White* was: (1) a common law right of publicity claim is broader than a statutory claim under Civ. C. § 3344 (971 F.2d at 1397-98); and (2) because Ms. White raised genuine issues of material fact, her Lanham Act and common law publicity claims should not have been dismissed on summary judgment (971 F.2d at 1399, 1401). This is hardly the "breathtakingly expansive view of the right of publicity" that Petitioners claim.[15] Pet. at 18.

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[14] The Ninth Circuit also upheld Mr. Waits' false endorsement claim under the Lanham Act (978 F.2d at 1106-07), which Respondents here have also asserted and which Petitioners ignore.

[15] Petitioners try to use this case to challenge what they call *White*'s "evocation standard." Petitioners claim that *White* "hold[s] that the right of publicity may be violated in all instances where a celebrity's identity is evoked." Pet. at 18. That exaggeration could not be farther from *White*'s actual holding.

As in this case, the Ninth Circuit in *White* did *not* undertake an exposition of the outer boundaries of California's state publicity law, and did *not* hold that Ms. White did or would succeed on her common law and Lanham Act claims. In both cases, the Ninth Circuit held only that plaintiffs presented genuine issues of material fact that could not be resolved on summary judgment. Just as this Court denied review of *White*'s unexceptional holding, the Court should deny review of the exact same rulings here.

C. The Ninth Circuit's Preemption Analysis Conforms with Decisions Across the Nation.

Far from being a renegade decision subverting federal law and unleashing chaos, the Ninth Circuit's ruling in *Wendt II* conforms with state and federal decisions across the land. Just a few months ago, the Fifth Circuit squarely held that the right of publicity under Texas law was *not* preempted: "**Because a person's name and likeness in themselves are not copyrightable**, and because the state law tort of misappropriation does not conflict with federal copyright law, appellees' claims are not preempted." *Brown v. Ames*, 201 F.3d 654, 656 (5th Cir. 2000). Specifically, the Fifth Circuit found that the subject matter

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Far from establishing any such broad "evocation" standard, the Ninth Circuit did not even hold that Ms. White would prevail on her publicity claim in that particular case. *White* simply held that the factual disputes in that case should not have been resolved on summary judgment. *Id.* at 1399, 1401. *White* did not interpret state publicity law in the abstract, and declined to set in stone "a laundry list of specific means of appropriating identity," because "[a] rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth." 971 F.2d at 1398. That narrow ruling is a far cry from holding that "anything that evokes identity" invades the right to publicity. *Cf.* Pet. at 18 and n.9; 21.

of plaintiffs' claims – their right to control the commercial use and exploitation of their own identities – did not fit within the subject matter of federal copyright law. Accordingly, plaintiffs' claim survived preemption analysis under 17 U.S.C. § 301(a). *Id.* at 657-58. As the Fifth Circuit explained, "the tort of misappropriation of name or likeness protects a person's persona. ***A persona does not fall within the subject matter of copyright*** – it does not consist of a 'writing' of an 'author' within the meaning of the Copyright Clause of the Constitution." *Id.* at 658 (quoting a string of authority discussed below).[16]

Every other case that has addressed this issue concurs with the Ninth and Fifth Circuits that copyright law ordinarily does not preempt state rights of publicity or personality. *See, e.g.*:

1. *Prima v. Darden Restaurants, Inc.*, 78 F.Supp.2d 337, 351-53 (D.N.J. 2000): Copyright Act does *not* preempt plaintiff's common law right of publicity.
2. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F.Supp.2d 867 (C.D.Cal. 1999): Copyright Act does *not* pre-empt California's statutory right of publicity (Civil Code § 3344), so plaintiff Dustin Hoffman could state a claim against ABC for manipulating a photograph from the motion picture "Tootsie" (to which Columbia Pictures, not Hoffman, owned the copyright) and placing it, without Hoffman's authorization, in ABC's L.A. Magazine. Hoffman's "right to protect the use of

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[16] The Fifth Circuit further held that plaintiffs' "names and likenesses do not become copyrightable simply because they are used to identify the source of a copyrighted work." *Brown* at 658. Therefore, even if Host's robots fell within Paramount's copyright – which Paramount has vehemently denied for the last ten years – that would still not destroy Respondents' publicity claims, just as it did not in *Brown*, *White*, or *Motschenbacher*. *See* Section II.B, *supra*.

his own name and image is separate from the copyrighted interest of Columbia in the motion picture Tootsie." *Id.* at 871. Further: "What Mr. Hoffman seeks to protect – his name, face and persona – are not 'writings' or 'works of authorship' that come within the subject matter of copyright. Moreover, the rights that Mr. Hoffman seeks to protect are not 'equivalent' to the rights protected by the Copyright Act. The claims asserted by Mr. Hoffman involve extra elements that are different in kind from those in a copyright infringement case." *Id.* at 875. "Plaintiff's own likeness and name cannot seriously be argued to constitute a 'work of authorship' within the meaning of 17 U.S.C. § 102. Thus, copyright preemption does not apply." *Id.* at 871.

3. *ASA Music Prods. v. Thomsun Electronics*, 49 U.S.P.Q.2d 1545, 1556 n.5 (S.D.N.Y. 1998): "a publicity claim is *not* preempted pursuant to 17 U.S.C. § 301."
4. *Michaels v. Internet Entertainment Group, Inc.*, 5 F.Supp.2d 823, 837 (C.D. Cal. 1998): state right of publicity claims are *not* preempted when the violation consists of more than merely copying a copyrighted work.
5. *Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930 (Sup.Ct., N.Y. County 1995): Copyright Act does *not* preempt baseball players' state law claim that unauthorized use of team photograph on clothing violated players' statutory right to publicity. "A right to publicity – to the commercial exploitation of one's identity – appears qualitatively different from copyright." *Id.* at 935. *Shamsky* expressly distinguished *Baltimore Orioles* on the ground that "a right of publicity in a particular performance is distinguishable

from a right to commercial exploitation of one's own identity." *Id.* at 936.

6. *Jarvis v. A&M Records*, 827 F.Supp. 282, 297 (D.N.J. 1993): Copyright Act does *not* pre-empt New Jersey state law against appropriating another's "voice or likeness."
7. *James v. Delilah Films, Inc.*, 544 N.Y.S.2d 447 (Sup.Ct., N.Y. County 1989): Copyright Act does *not* pre-empt state law actions "pertaining to invasion of privacy."
8. *Ippolito v. Ono-Lennon*, 526 N.Y.S.2d 877, 882-83 (Sup.Ct., N.Y. County 1988): *no* federal preemption of New York statutory right of publicity (Civil Rights Law § 51) claim for unauthorized commercial release of band's prior performance.
9. *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F.Supp. 1188, 1201 (S.D.N.Y. 1983): "The right of publicity . . . grants plaintiffs relief where none exists under federal law. Federal preemption poses no bar to such relief. The intangible proprietary interest protected by the right of publicity simply does not constitute a writing, and therefore falls outside of the preemption standards established by Congress in the copyright law."
10. *Allied Artists Pictures Corp. v. Rhodes*, 496 F.Supp. 408, 444 (S.D. Ohio 1980), *aff'd*, 679 F.2d 656, 662-63 (6th Cir. 1982): *no* preemption of state laws of privacy or defamation.

Petitioners do not address, acknowledge, or even cite, a single one of these cases.[17] Instead, they point to two cases, *Baltimore Orioles* and *Fleet*, which are readily distinguishable.

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[17] For additional cases, *see* 1 Nimmer § 1.01[B][1][c]; McCarthy § 5.5[B][5].

1. There is No "Direct Conflict" Between *Wendt II* and the Seventh Circuit's Decision in *Baltimore Orioles*.

First, the Ninth Circuit is not obliged to follow a 14-year old Seventh Circuit decision construing another state's law. Next, the Supreme Court need not address every conceivable conflict that may arise between different circuits' cases. This Court consistently declines to resolve a conflict among the circuits when it can decide a controversy before it on other grounds. *See, e.g., Braxton v. United States*, 500 U.S. 344 (1991). To qualify for Supreme Court review, the conflict must be immediate and direct, and must involve an "important" federal question. Since these conditions are not satisfied here, even if the Ninth Circuit's decision conflicted with *Baltimore Orioles*, that would not compel Supreme Court review. However, there is no real conflict between the two circuit decisions at all.

Baltimore Orioles v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987), held that baseball players could not prevent their employer baseball clubs from broadcasting baseball games to which the clubs owned the copyright. That decision neither conflicts with *Wendt II*, nor is it factually comparable. All the baseball players were trying to do in *Baltimore Orioles* was to prevent the copyright holders from displaying their copyrighted performances. Because the Orioles claimed that displaying the copyrighted work *itself* infringed their state rights, they triggered the classic form of federal preemption under 17 U.S.C. § 301(a). *See* Nimmer § 1.01[B][1] at 12-13, and Section III.A, *supra*. In contrast, Respondents here are *not* challenging Paramount's copyright in *Cheers*, and are *not* trying to control Paramount's display of any *Cheers* episodes. Also, Paramount has repeatedly denied that Host's robots fall under Paramount's copyright, and Host has changed its robots' names to distinguish them from any *Cheers* characters.

An even more critical distinction between *Wendt II* and *Baltimore Orioles* is that the Seventh Circuit decision was premised on the "work-for-hire" doctrine under 17 U.S.C. § 201(b), under which the employer owns the copyrights to works he paid employees to create. The fact that defendant baseball clubs paid the plaintiffs millions of dollars to play baseball was crucial to the Seventh Circuit's reasoning, and that court spent many pages on the work-for-hire doctrine before addressing any preemption issues. *See* 805 F.2d at 667-673. Presumably, the defendant employers paid the players in order to collect money from showing the resulting games. It would be Orwellian to let the players collect their handsome salaries, and then unilaterally prevent their employers from gaining any benefit from the bargain. In sharp contrast, neither Paramount nor Host have paid Respondents a penny for appropriating their identities to sell beer in airport bars.

While *Baltimore Orioles* refused to let the plaintiff players collect their salaries and then trump their employers' copyright in the resulting product, the Seventh Circuit recognized that "[a] player's right of publicity in his name or likeness would *not* be preempted if a company, without the consent of the player, used the player's name to advertise its product." *Id.* at 676 n.24. The Seventh Circuit merely held that "a right of publicity in a performance that has been reduced to tangible form is subject to preemption." *Id.* at 677-78 & n.26. Since Host's robots are not a "performance" by Messrs. Wendt and Ratzenberger, and since Respondents are not challenging Paramount's copyright in *Cheers*, *Baltimore Orioles* is simply inapposite.[18]

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[18] Lest the Court think that *Baltimore Orioles* signals a brave new world in the area of federal preemption, that decision has been heavily criticized by cases and commentators alike. Professor Nimmer issues a brutal criticism of the Seventh Circuit's premise that a baseball game becomes a "protectable

2. The Ninth Circuit's Decision Does Not Conflict with California State Law.

The United States Supreme Court is not the national expounder of state law, and avoids entangling itself in state law disputes. "The Supreme Court gives great weight to the circuit court's determination of local law. Accordingly, a conflict between a decision of the federal court of appeals and applicable state or local law seldom motivates the Court to grant *certiorari*."[19] This Court only provides review for a federal circuit case that "has decided an important federal question in a way that conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a). Petitioners here fail to point to any California Supreme Court decision on any "important federal question" with which the Ninth Circuit's decision in *Wendt II* conflicts. In fact, the only California Supreme Court opinion to address the relationship between state rights of publicity and federal copyright law concluded that state rights would *not* be preempted.[20]

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work of authorship" simply because someone records it on videotape. Nimmer, §§ 1.01[B][1][c] at 24 and 2.09[F]. Professor Nimmer also ridicules the case for ignoring every prior decision in the area of federal preemption. *Id. See also Brown*, 201 F.3d at 659 (distinguishing *Baltimore Orioles* and noting that it has been "heavily criticized"); *Fleet v. CBS*, 50 Cal. App. 4th 1911, 1922-23 (Cal. App. 1996) (noting extensive criticism of *Baltimore Orioles* and concluding that "the case is of limited value"); Shelley Ross Saxer, *Baltimore Orioles, Inc. v. Major League Baseball Players Association: The Right of Publicity in Game Performances and Federal Copyright Preemption*, 36 U.C.L.A. L.Rev. 861, 870 (1989); David E. Shipley, *Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity under the Copyright Act of 1976*, 20 Ariz. St. L.J. 369, 384-88 (1988).

[19] 23 Moore §§ 510.23[3][c]; *see also* Section I.B, *supra*.

[20] *See Lugosi v. Universal Pictures*, 25 Cal.3d 813, 848 (1979) (Bird, C.J., dissenting, preemption issue not reached by majority): "The intangible proprietary interest protected by the

Just three months ago, the same California appellate court that decided *Fleet* revisited the interface between copyright law and state rights of publicity, and squarely held that "because a ***human likeness is not copyrightable***, even if captured in a copyrighted photograph, [plaintiffs'] section 3344 claims against the unauthorized publisher of their photographs are ***not*** the equivalent of a copyright infringement claim and are ***not*** **preempted** by federal copyright law." *KNB v. Matthews*, 78 Cal.App.4th at 365 (2000). KNB expressly "limit[s] *Fleet*'s broad language regarding preemption of the actors' section 3344 claims to the unique facts of that case." *KNB* at 374. Although this is California's most recent authority on preemption, Petitioners relegate *KNB* to a footnote quoting the very case it superceded. Pet. at 13 n.5.

In *KNB*, the plaintiff sued under Cal. Civ. C. § 3344 for defendant's unauthorized display of erotic photographs to which plaintiff held the copyrights. The court recognized that "[t]here can be no dispute that photographs are copyrightable," and "[i]t is also undisputed that the unauthorized commercial display of the copyrighted photographs on defendant's website constituted an infringement of plaintiff's exclusive [copyright]." *Id.* at 364. Nonetheless, the California court concluded that plaintiffs' statutory publicity claim was *not* preempted, because a human likeness is *per se* uncopyrightable. *Id.* at 365. Thus, *KNB* incontrovertibly proves that a California state court would agree with the Ninth Circuit that federal copyright law does *not* preempt Respondents' state publicity claims in this case.

So much for Petitioners' argument that the Ninth Circuit's decision "conflicts directly" with California state

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right of publicity simply does not constitute a writing. . . . Thus, congressional action has not preempted the recognition of common law protection for the right of publicity."

law. Incidentally, even the one superceded case Petitioners cite is not in conflict. In *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911 (Cal. App. 1996), the plaintiffs were actors in a copyrighted film who were never paid, and who claimed that displaying the copyrighted work itself (the movie) infringed their state right of publicity. *Fleet* repeatedly stressed that it addressed "a ***very narrow*** issue: whether an actor may bring a [Cal. Civ. C. § 3344 claim] when the ***only*** alleged exploitation occurred through the distribution [of the copyrighted movie]." *Id.* at 1913. Because plaintiffs claimed that showing the copyright work *itself* infringed their state rights, the *Fleet* court concluded that in those narrow circumstances, the plaintiffs' state rights were preempted.

In obvious contrast, Respondents here are not challenging Paramount's right to display any *Cheers* episodes, and Host's robots do not fall under Paramount's copyright. Therefore, even if *KNB* had not limited *Fleet* to its unique facts, *Fleet* would not compel a different result in this case. Besides, even *Fleet* expressly noted that "as a general proposition section 3344 is intended to protect rights which cannot be copyrighted and that claims made under its provisions are usually not preempted." *Fleet*, 50 Cal.App.4th at 1919.

IV. Petitioners Waived Their Constitutional First Amendment, Conflict Preemption and Dormant Copyright Clause Arguments

A. This Court Should Not Address Constitutional Issues Absent Strict Necessity.

It is a fundamental tenet of this Court's jurisprudence that it will avoid deciding constitutional issues if the case before it may be resolved on other grounds. This Court strives to avoid constitutional issues absent strict necessity, and usually declines to address an issue in broader terms than the precise facts of a particular case before it require. *See Frisby v. Schultz*, 487 U.S. 474, 474-75 (1988)

(statutes will be interpreted to avoid constitutional difficulties); *Rescue Army v. Municipal Court*, 331 U.S. 549, 570-71 (1947) (Supreme Court will avoid constitutional issues absent strict necessity). Because Petitioners have never before raised their dormant copyright clause, conflict preemption, or First Amendment arguments, this Court need not address these constitutional issues for the first time on this appeal.

B. Petitioners' Conflict Preemption and Dormant Copyright Clause Arguments are Waived and Meritless.

Over the past seven years, Petitioners have written a dozen hefty briefs on the preemption issue. Not one of Petitioners' prior submissions to any court at any time ever raised the issues of conflict preemption or the dormant copyright clause. Based on this Court's firmly established precedent that issues raised for the first time in a petition for *certiorari* will be deemed waived, Petitioners' latest theories should not be reviewed. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) ("ordinarily, this Court does not decide questions not raised or resolved" in the lower courts). "As a rule, the Court will not grant *certiorari* to decide an issue that was not raised in the proceedings below – irrespective of its general significance or novelty." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.13 (1976) (respondents barred from raising argument under different subsection of same Act, because they had not raised that specific argument below).

In any case, Petitioners' constitutional preemption arguments are easy to dispel. In its leading preemption case in the intellectual property field, this Court explained that "the case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between

them.' " *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (accord). The legislative history of Section 301 expressly addressed state rights of publicity and personality, and concluded that the Copyright Act does *not* preempt them:

> "The evolving common law rights of 'privacy,' 'publicity,' and trade secrets, and the general law of defamation and fraud, would remain **unaffected** as long as the cause of action contained elements, such as invasion of personal rights . . . that are different in kind from copyright infringement." H.R. Rep. No. 94-1476 of the House of Representatives Committee of the Judiciary, 94th Cong., 2d Sess. 132 (September 3, 1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5748.

Thus, not only was Congress aware of the potential tension between federal copyright law and state rights of publicity, but it directly addressed the issue and determined that such state laws do not conflict with the purposes or objectives of the Copyright Act. As the Fifth Circuit held when analyzing the very conflict preemption argument Petitioners advance for the first time now, "Congress was aware of the operation of state law on the rights of privacy and publicity, and indicated its intention that such state law causes of action remain." *Brown*, 201 F.3d at 661. The Ninth Circuit has also rejected the conflict preemption argument in *Waits v. Frito-Lay, Inc.*, 978 F.2d at 1099-1110, *cert. denied*, 506 U.S. 1080 (1993), which may explain why Petitioners did not bother to raise the same issue to the Ninth Circuit in this case.

C. Petitioners' First Amendment Argument is Waived and Speculative.

Petitioners never raised any First Amendment issues before the Ninth Circuit on either prior appeal, nor have Petitioners ever established that Host's robots constitute

protected speech. In the seven years this case has traveled the federal courts, none of the parties ever briefed or argued any First Amendment issues. Therefore, Petitioners should not feign surprise that the Ninth Circuit said "not a word about the First Amendment." Pet. at 23. This constitutional argument is *waived*, and as this Court has repeatedly held, it will not consider issues that were neither raised nor resolved in the lower courts. *Taylor*, 503 U.S. at 645-46; *Ernst & Ernst*, 425 U.S. at 194 n.13.

Also, because this is an interlocutory appeal with no substantive decision to review, the First Amendment worries that Petitioners have recently discovered are entirely speculative and hypothetical. While the possible First Amendment implications of the outer reaches of personal publicity rights undoubtedly present very interesting topics for academic inquiry and debate, there is simply no present conflict that requires the intervention of the highest court in the land.

Further, this Court has already upheld a state law protecting the right of publicity against First Amendment challenge. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-77 & n.13 (1977). In *Zacchini*, this Court recognized that while publicity rights were "analogous to the goals of patent and copyright law," states were free to provide additional protection to a person's right of publicity, and upheld Ohio's publicity law against constitutional challenge. Thus, this Court recognized that state laws protecting privacy and publicity were consistent with and could co-exist with federal copyright law and the First Amendment.

The Central District of California has also recently rejected a defendant's First Amendment challenge to Dustin Hoffman's state rights of publicity. *See Hoffman*, 33 F.Supp.2d 867, 875 (C.D. Cal. 1999); *see also, Waits*, 978

F.2d at 1099-1100. *Zacchini*, *Waits*, and *Hoffman* deflate Petitioners' First Amendment argument.[21]

V. Conclusion

Because no compelling reason justifies the Supreme Court's review of an interlocutory ruling in a fact-intensive dispute involving five state law claims, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari at this time.

Respectfully submitted,

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Los Angeles, California

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[21] Petitioner's citation to *Polydoros* is totally inapposite, because that case merely held that a plaintiff cannot assert defamation and publicity claims against a fictional movie "which does not portray the plaintiff at all" and admittedly caused him no damage. *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal.Rptr.2d 305, 310 (Cal. App. 1997). That conclusion does not raise any serious First Amendment problems.